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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

October Term, 1996

CHARLES A. TORO,
Petitioner,

VS.

DEPOSITORY TRUST CO.,
STUART FISHBEIN,
LORI KLEBOUS-ZIVNY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
(APPELLATE DIVISION, 1ST DEPARTMENT)
OF THE STATE OF NEW YORK COUNTY OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED

1. a) Did Respondents violate Title 1 of the Americans With Disabilities Act (29 CFR part 1630.13(b)) when they sent instructions to the Petitioner to return completed claim forms by the Doctor containing confidential diagnosis and prognosis for recovery directly to the Respondents?

   b) Additionally, did Respondents violate Title 1 of the Americans With Disabilities Act (29 CFR part 1630.13(b)) by showing up at the hospital to ask the Petitioner for his diagnosis?

   c) Did Respondents invade the Petitioner's privacy when they entered the Petitioner's private office at Respondent DTC's offices and remove materials from his desk and office which contained detailed information regarding employee rights and benefit entitlements?

2. Did Respondents violate The Older Workers Benefit protection Act of 1990 (29 U.S.C. §626f(1) & (3)) governing the use of releases and Title 1 of the Americans With Disabilities Act (29 CFR part 1630.5 and 1630.6(c)) and New York State Workers' Compensation Law Article 9 §203, when they attempted to get the Petitioner to sign a Waiver of Liability/Release which states he will not return to work because he has AIDS?

3. Did Respondents violate the Early Retirement Income Security Act "Protection of Employee Benefits Rights" title (29 U.S.C. §1132(a)(1)(A) & (B)), and §1132(c)(1) when they refused to respond to two requests for materials regarding pension entitlements?

4. Did Respondents violate Title 1 of the Americans With Disabilities Act (29 CFR part 1630.4(c), 1630.5) and New York State Workers' Compensation Laws Article 9 §203 requiring the preservation of a job for a qualified individual with a disability by sending the Petitioner a letter stating a job will no longer be available after six months on short term disability?

5. Did Respondents violate Title 1 of the Americans With Disabilities Act (29 CFR 1630.4(c)) by breaching a contract signed by both parties (i.e., Respondent DTC and the Petitioner) when they failed to deliver the full long term disability benefits as described in the contract?

6. Did Respondents violate Title 1 of the Americans With Disabilities Act (29 CFR part 1630.9) when they did not respond to two requests for reasonable accommodation in employment?
7. Did Respondents violate Title 1 of the Americans With Disabilities Act (29 CFR part 1630.4(c) when they denied payment of A) bonus and B) vacation days to the Petitioner?

SUMMATION

Did the numerous violations of Federal laws by the Respondents represent a sophisticated means in which to discriminate against the Petitioner because he has AIDS; as is evidenced in the Waiver of Liability/Release prepared by Respondents' General Counsel and confirmed in the presence of the New York City Commission on Human Rights? If so, does it also represent a violation of the anti-discrimination law - Section 8-107.1(a) of the Administrative Code of the City of New York?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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TO THE HONORABLE, THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner Charles A. Toro respectfully prays that a writ of certiorari issue to apply the Federal, State and City laws and their remedies to the issues on record that were not addressed by the lower courts.

OPINIONS BELOW

The decision and order of the Supreme Court (Appellate Division 1st Department) State of New York County of New York is unpublished, and is reprinted in the Appendix hereto, p. A-21, *infra*.

The decision, judgement and order of the Supreme Court of the State of New York County of New York IAS Part 3 (Davis, W. J.) is unpublished, and is reprinted hereto, beginning at p. A-15, *infra*.

The determination and order after review by the New York City Commission on Human Rights is unpublished, and is reprinted hereto, beginning at p. A-13, *infra*.

The determination and order after investigation of the New York City Commission on Human Rights is unpublished, and is reprinted hereto, beginning at p. A-5, *infra*.

JURISDICTION

The complaint was timely presented to the New York City Commission on Human Rights who then issued a verified complaint and subsequently an amended verified complaint naming the Respondents Depository Trust Company, Stuart Fishbein and Lori Klebous-Zivny as defendants. The complaint alleged discrimination because of disability of AIDS and denial of equal terms and conditions of employment in violation of the Americans With Disabilities Act of 1990 and in violation of the New York City Administrative Code Section 8-107.1(a). The Agency's Determination and Order After Investigation is dated June 30, 1994. (App. pp. A-5-12, *infra*.)

An appeal to the Commission's Determination and Order After Investigation was timely made. The Commission's Determination and Order after review was dated September, 1994. (App. pp. A-13-14, *infra*.)

The case was presented via Article 78 before Judge William J. Davis in the Supreme Court State of New York County of New York. The Supreme Court had original jurisdiction over this case pursuant to Section 8-110 of the New York City Administrative Code, because the petitioner, Charles A. Toro, claimed that he was schooled out of his position with Respondent Depository Trust Company and was denied equal terms and conditions of employment because of his disability of AIDS, all in violation of the Americans With Disabilities Act of 1990, 29 CFR parts 1630.4(c), 1630.5, 1630.6(c), 1630.9,

1630.13(b), and also in violation of the Early Retirement Income Security Act "Protection of Employee Rights" Title and New York State employment regulations regarding the preservation of a position for a disabled employee. The Supreme Court entered its final order and judgement on November 17, 1994. (App. pp. A-15-19, *infra*.)

The Petitioner-appellant moved before the Supreme Court (Appellate Division, 1st Department) State of New York County of New York for an enlargement of time in which to file a notice of appeal and for leave to file a notice of appeal in connection with the judgement of the Supreme Court, New York County entered on November 17, 1994. The motion was granted to the extent of deeming the Notice of Appeal dated April 4, 1995 as timely served and enlarging the Petitioner-appellant's time in which to perfect the appeal to the October 1995 term of the Court, with leave to seek a further enlargement, if necessary. The Supreme Court (Appellate Division, 1st Department) County of New York entered its order dated May 25, 1995. (App. p. A-20, *infra*.)

The Petitioner-appellant timely filed the appeal for the October 1995 term with the Supreme Court (Appellate Division, 1st Department) County of New York. The Court reaffirmed the IAS Court's finding and entered its decision and order on January 25, 1996. (App. p. A-21, *infra*.)

The Petitioner timely moved before the Court of Appeals State of New York with a motion for preference due to the progression of his illness and for leave to appeal to the Court of Appeals. The Court's decision and order denied the leave to appeal and was entered on April 4, 1996. (App. pp. A-22-23, *infra*.)

The Petitioner timely moved before the Court of Appeals State of New York with a motion for reargument. The Court's Decision and Order denied the motion for reargument and was entered on June 13, 1996. (App. pp. A-24-25, *infra*.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner is proceeding in Federal Court under statutory provision - Title VII of the Civil Rights Act of 1964.

Title 1 of the Americans With Disabilities Act, 29 CFR parts 1630.4(c), 1630.5, 1630.6(c), 1630.9, 1630.13(b), provide in material part as follows:

Part 1630.4(c)

4(c) States it is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability regarding rates of pay or any other form of compensation and changes in compensation, and also with regard to any other term, condition, or privilege of employment.

Part 1630.5

5 States you cannot segregate or classify an employee which would adversely affect employment opportunity or status.

Part 1630.6(c)

6(c) Prohibits a covered entity from engaging in a contractual arrangement designed to limit employment opportunities for a disabled employee.

Part 1630.9

9 Regarding reasonable accommodation makes it unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability.

Part 1630.13(b)

13(b) States it is impermissible to ask whether an applicant or employee has a disability or as to the nature or severity of such disability.

Title II of the Older Workers Benefit Protection Act of 1990 regarding Waiver of Rights or Claims 29 U.S.C. §626f(1) & (3), provide in part as follows:

§626f(1)

f(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum --

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

§626f(3)

f(3) In any dispute that may arise over whether any of the requirements, conditions and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

The Early Retirement Income Security Act - "Protection of Employee Benefits Rights" Title 29 U.S.C. §1132(a)(1)(A) & (B) and §1132(c)(1), provide in material part as follows:

§1132(a) Persons empowered to bring a civil action

A civil action may be brought --

(1) by a participant or beneficiary - (A) for the relief provided for in subsection (c) of this section or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

§1132(c) Administrator's refusal to supply requested information

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which

such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

New York State Workers' Compensation Laws Article 9 §203, provides for in part as follows:

§203. Employees eligible for benefits under section two hundred four

An employee who becomes disabled while eligible for benefits in the employment of a covered employer shall not be deemed, for the purposes of this article, to have such employment terminated during any period he or she is eligible to receive benefits under section two hundred four with respect to such employment.

The Administrative Code of the City of New York Section 8-107.1(a), provides in material part as follows:

§8-107 Unlawful discriminatory practices

1. Employment. It shall be an unlawful discriminatory practice:

(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

STATEMENT OF THE CASE

Stuart Fishbein, vice president of the audit department at the Depository Trust Company and his assistant Lori Klebous-Zivny, director; Mr. Toro's immediate supervisors, collectively and individually schooled Mr. Toro out of his position at the Depository Trust Company and denied him equal terms and conditions of employment upon learning of his disability - AIDS. Specifically, he

was being coerced into signing a waiver of liability/release document which states; Mr. Toro has AIDS and would not return to work. When they failed to obtain Mr. Toro's signature on their release, his position with the company was effectively terminated after six months of disability. Additionally, the Depository Trust Company committed an act of invasion of privacy and breach of confidentiality when they obtained confidential medical diagnosis and prognosis for recovery via letters instructing Mr. Toro and his doctor to divulge his information. In the process, Mr. Toro was denied pension materials, reasonable accommodation in the work place, bonus and payment for unused vacation days; additionally Mr. Toro was denied full long term disability benefits as stated in a contractual agreement signed in 1991.

As of January 23, 1993, and after only six months of disability, Mr. Toro was classified as a terminated employee by the Depository Trust Company. Stuart Fishbein and Lori Klebous-Zivny, therefore, refused to speak further with Mr. Toro regarding his benefit entitlements.

On March 5, 1993, Mr. Toro contacted the New York City Commission on Human Rights; which resulted in a Verified Complaint and Amended Verified Complaint being issued against the Depository Trust Company, Stuart Fishbein and Lori Klebous-Zivny on the basis they had discriminated against Mr. Toro because he had AIDS and had denied him equal terms and conditions of employment. The specific issues and laws violated are brought to the Court's attention as follows:

1. Invasion of Privacy/Breach of Confidentiality

Title 1 of the Americans With Disabilities Act (29 CFR part 1630.13(b))

The Administrative Code of the City of New York Section 8-107.1(a)

a) The New York City Commission on Human Rights has overlooked a letter dated December 16, 1992, (App. pp. A-26-27,*infra*.) directing Mr. Toro and his doctor to return to the Depository Trust Company, the completed long term disability claim form containing confidential medical diagnosis and prognosis for recovery. This issue was again raised by Mr. Toro in a meeting held with the New York City Commission on Human Rights (herein after "Commission") on September 8, 1993. However, the Commission's Determination and Order dated June 30, 1994, (App. pp. A-5-12,*infra*.) does not address this issue.

This letter was again presented to and placed on the record with the Supreme Court New York County (via Article 78 proceeding) on October 24, 1994 (Article 78 brief at pages 2-3, points 3 and 4; also its Appendix as Attachment C). The Court did not address this issue in its Decision and Order dated November 17, 1994, (App. pp. A-15-19,*infra*.).

The Supreme Court (Appellate Division, 1st Department) County of New York in their October 1995 term did not address this issue and thus, did not apply the law in their Decision and Order dated January 25, 1996, (App. p. A-21,*infra*.).

b) Also, the Commission has overlooked in the September 8, 1993 meeting held by the Commission that Respondent Lori Klebous-Zivny admitted she came to the hospital (where she obtained Mr. Toro's diagnosis) to compile a list of benefits (App. p. A-28,*infra*.) solely from Mr. Toro's memory while at his bedside. She also admitted in this meeting that she knew of Mr. Toro's AIDS diagnosis two and a half years prior to Mr. Toro's disclosure. However, she would not disclose how she obtained this information. These issues were not addressed in the Commission's Determination and Order dated June 30, 1994 (App. pp. A-5-12,*infra*.).

These issues were again presented to and placed on the record with the Supreme Court County of New York (via Article 78 proceeding) on October 24, 1994, (Article 78 brief page 6 point 8; also in its Appendix as Attachment B pages 7 and 8 point g, Attachment B page 24 point b, Attachment K page 2 - ref. July 21). However, the Court did not address these issues in its Determination and Order dated November 17, 1994, (App. pp. A-15-19,*infra*.).

The Supreme Court (Appellate Division, 1st Department) County of New York also did not address these issues and, thus did not apply the law in its Determination and Order dated January 25, 1996, (App. p. A-21,*infra*.).

c) The Commission does not address the violation of Mr. Toro's private office at Respondent Depository Trust Company's offices. A Manager's Handbook detailing company policies and containing detailed information on employee's rights and benefits was removed. Additionally, Mr. Toro's desk was riffled and documents pertaining to the 1991 management Incentive Bonus - contained in Mr. Toro's personal files - was removed. This was a blatant attempt to deny Mr. Toro information pertaining to his rights to benefits and information pertaining to conditions of employment. This incident was immediately reported to the Commission; however, it was never

addressed in their Determination and Order dated June 30, 1994, (App. pp. A-5-12,*infra*.).

This issue was again presented to and placed on the record with the Supreme Court County of New York (via Article 78 proceeding - Article 78 Appendix as Attachment B pages 3-4 point a), as follows:

> "a) Also, as I have informed Marci Feltman sometime in the summer of 1993, all policy and benefits materials were removed from my desk and office at DTC. This can be confirmed through Lewis Ruddy, Manager (898-3364)."

However, the Court did not address this issue in its Decision and Order dated November 17, 1994, (App. pp. A-15-19, *infra*.).

The Supreme Court (Appellate Division, 1st Department) County of New York also did not address this issue in its Decision and Order dated January 25, 1996, (App. p. A-21, *infra*.)

2. Release/Waiver of Liability

Title 1 of the Americans With Disabilities Act (29 CFR part 1630.5, 1630.6(c).

Title II of the Older Workers Benefit Protection Act of 1990 (29 U.S.C. §626f(1) and f(3)).

The Administrative Code of the City of New York Section 8-107.1(a).

New York State Workers Compensation Law Article 9 §203.

The Commission has overlooked the discriminatory use of the release/waiver of liability (App. p. A-29, *infra*.) which required that Mr. Toro resign his position merely because he wished to disclose his illness of AIDS. Respondents Depository Trust Company, Fishbein and Klebous-Zivny collectively attempted to get Mr. Toro to sign the release as written - without any alteration to the wording. Mr. Toro had made it clear on numerous occasions he would not sign a release requiring him to resign his position. The purpose of the release was fraudulently represented to Mr. Toro as strictly a requirement for disclosure of his diagnosis. Additionally, Mr. Toro was not advised to consult an attorney. Should he have signed, he would have given away the right to any recourse in the event he was denied any benefits or conditions of employment. The Commission never included the release/waiver of liability on the Verified Complaint or Amended Verified Complaint. For a second time Mr. Toro presented the release/ waiver of liability and all the related facts to the Commission in a meeting held by the Commission on September 8, 1993. The attorney for the respondents replied as to why the release was used as follows:

"Allan Weitzman, attorney for defendants admitted in the meeting Sep't 8, 1993 (at the Commission's offices) that DTC wanted me to sign it because I have AIDS and because of my illness I represent a liability to DTC and its employees. Where upon, Marci confirmed this to be discriminatory and I quote (I cannot fathom this - you are in the halls of justice for discrimination and that this waiver was not part of the complaint)."
(Article 78 Appendix pages 19-20 point d).

However, the Commission still did not address this in its Determination and Order dated June 30, 1994, (App. pp. A-5-12, *infra.*).

The release/waiver of liability and the facts reported to the Commission were again reported to and placed on the record with the Supreme Court County of New York (via Article 78 proceeding - Article 78 brief at page 1 point 1; also its Appendix as Attachment A, Attachment B page 15 point d, Attachment B pages 17-22 points b-h). However, the Court does not address this issue in its Decision and Order dated November 17, 1994, (App. pp. A-15-19, *infra.*).

The Supreme Court (Appellate Division, 1st Department) County of New York also did not address this issue and thus, did not apply the law in its Decision and Order dated January 25, 1996, (App. p. A-21, *infra.*).

3. Request for Pension Materials

The Early Retirement Income Security Act "Protection of Employee Benefits Rights" Title (29 U.S.C. §1132(a)(1)(A) & (B), and §1132(c)(1).

Title 1 of the Americans With Disabilities Act (29 CFR part 1630.4(c).

The Commission has overlooked the fact that pension materials were denied to Mr. Toro after he made two formal requests. The first was when Respondent Klebous-Zivny came to the hospital on July 21, 1992. In that visit Respondent Klebous-Zivny came to the hospital to ascertain the nature of Mr. Toro's illness and to compile a list of benefits solely from Mr. Toro's memory. At which time, she instructed Mr. Toro not to contact the benefits department and that Mr. Toro was to deal with her exclusively with regard to any benefits to which he could remember he was entitled. The record reads as follows:

"Since <u>they instructed</u> me not to contact the benefits department regarding my benefits and since they handled the conveyance and interpretation of my benefits

exclusively as can be evidenced by the documentation I received from Lori - DTC (see Attachments A & B of the first package I sent to the Commission March 1993)."
(Article 78 Appendix as Attachment B page 3 point a).

The resulting list of benefits compiled by respondent Klebous-Zivny and sent to Mr. Toro on August 21, 1992, evidences her exclusive conveyance and interpretation of Mr. Toro's benefits. It also shows that he did address his pension entitlements in this hospital visit (App. p. A-28, *infra.*).

The second request was made via the Amended Verified Complaint issued against Respondents Depository Trust Company, Stuart Fishbein and Lori Klebous-Zivny and filed on April 15, 1993. Mr. Toro confirmed with the Commission's investigator - Marci Feltman - in the September 8, 1993, meeting held at the Commission's Offices that the Amended Verified Complaint represented a formal request for pension materials and that Mr. Toro need not make any more requests. However, the commission still did not address these facts in its Determination and Order dated June 30, 1994, (App. pp. A-5-12, *infra.*).

These facts were again reported to and placed on the record with the Supreme Court County of New York (via Article 78 proceeding - Article 78 brief at page 2 point 2a; also its Appendix as Attachment B page 9 point 2a, and Attachment H page 1). However, the court did not address these facts in its Decision and Order dated November 17, 1994, (App. pp. A-15-19, *infra.*).

The Supreme Court (Appellate Division, 1st Department) County of New York also did not address this issue and thus, did not apply the law in its Decision and Order dated January 25, 1996, (App. p. A-21, *infra.*).

4. Job Termination

Title 1 of the Americans With Disabilities Act (29 CFR part 1630.4(c), part 1630.5, and part 1630.9).
New York State Workers' Compensation Law Article 9 §203.
The Administrative Code of the City of New York Section 8-107.1(a).

The Commission has overlooked a document sent by Respondent DTC to Mr. Toro on December 16, 1992; effectively terminating his position after six months of disability. It also contained working indicating his position or a comparable position will not be guaranteed. Specifically, it reads as follows:

> "DTC cannot guarantee a job will be available if you are able to return to work. At that time, however, you may reapply to DTC for the same or comparable job. Your application will be treated the same as that of other prospective applicants." (App. pp. A-26-27, *infra*.).

This letter was sent to Mr. Toro prior to him making application for long term disability benefits. Additionally Respondent DTC even states in their Position Paper dated June 2, 1993, that:

> "DTC does not have a 'procedure for returning to work to work.'" (Commission's record).

Thus, evidencing their discriminatory practice against disabled employees. However, the Commission still did not address these facts in its Determination and Order dated June 30, 1994, (App. pp. A-5-12, *infra*.).

This issue was again reported to and placed on the record with the Supreme Court County of New York (via Article 78 proceeding - Article 78 brief at page 2 point 3; also its Appendix as Attachment C, and Attachment H page 5). However, the Court still did not address this issue in its Decision and Order dated November 17, 1994, (App. pp. A-15-19, *infra*.).

The Supreme Court (Appellate Division, 1st Department) County of New York also did not address this issue and thus, did not apply the law in its Decision and Order dated January 25, 1996, (App. p. A-21, *infra*.).

5. Breach of Contract for Full Long Term Disability Benefits

Title 1 of the Americans With Disabilities Act (29 CFR part 1630.4(c)). The Administrative Code of the City of New York Section 8-107.1(a).

The Commission has overlooked a contract Mr. Toro had entered into with Respondent Depository Trust Company on September 20, 1991, wherein he agreed to pay the full cost of premiums for long term disability benefits to be based on Mr. Toro's base salary, (App. pp. A-31-33, *infra*.). After the verified complaint was filed on March 23, 1993, Respondent Depository Trust Company attempted to return to Mr. Toro (via check and letter dated March 31, 1993) (Article 78 - Appendix as Attachment G) the premiums they had collected over a five month period. Mr. Toro had been paying premiums for a long term disability benefit based on his full salary until he began to collect a benefit. Respondent Depository Trust Company attempted to justify a reduction to Mr. Toro's base salary

and benefit when they used his salary before his last raise for benefit purposes. The refund represented the difference between the higher and lower salary. This letter and check were reported to and placed on the Commission's record. Mr. Toro was advised by the Commission not to cash the check. Additionally, two letters were mailed to Mr. Toro by Respondent Depository Trust Company (Article 78 - Appendix as Attachment H page 5 of 5 "Note"; also Commission's record). These letters shift responsibility for determining the benefit from Depository Trust Company to the insurance carrier and from the insurance carrier back to Depository Trust Company. However, neither letter addresses the contract held by Mr. Toro. These letters were given to and placed on the Commission's record. However, these facts were still not addressed by the Commission in its Determination and Order dated June 30, 1994, (App. pp. A-5-12, *infra*.).

These issues were again reported to and placed on the record with the Supreme Court County of New York (via Article 78 proceeding - Article 78 brief at pages 3-4 point 5; also its Appendix as Attachment B pages 5-7 points c-f, Attachment B 1a-1d, Attachment F, Attachment G, and Attachment H pages 2-3). However, the Court still did not address these issues in its Decision and Order dated November 17, 1994, (App. pp. A-15-19, *infra*.).

The Supreme Court (Appellate Division, 1st Department) County of New York also did not address this issue and thus, did not apply the law in its Decision and Order dated January 25, 1996, (App. p. A-21, *infra*.).

6. Request for Reasonable Accommodation

Title 1 of the Americans With Disabilities Act (29 CFR part 1630.4(c) and part 1630.9).

The Administrative Code of the City of New York Section 8-107.1(a).

The Commission overlooked and misapprehended two requests for reasonable accommodation in the work place made by Mr. Toro directly to Respondent Klebous-Zivny. These requests were purposely not addressed by Respondent Klebous-Zivny. The first request was made by Mr. Toro to Respondent Klebous-Zivny during the July 21, 1992, visit to the hospital. Mr. Toro returned to Respondent Klebous-Zivny files which he had reviewed while in the hospital as a basis upon which to request reasonable accommodation in the workplace. Mr. Toro and Respondent Klebous-Zivny discussed how files could be Federal Expressed back and forward between home and the work place in order to allow him to maintain his

responsibilities at work. However, Respondent Klebous-Zivny never followed up on this request. A second request was made to Respondent Klebous-Zivny by Mr. Toro's life partner - Jack Serratelli, Jr. - in the presence of and at the request of Mr. Toro. When Respondent Klebous-Zivny was again asked to send work home to Mr. Toro to keep him active as an employee, she refused to respond. This request was made to Respondent Klebous-Zivny during a December 4, 1992, visit at Mr. Toro's home. Mr. Toro again reported these two requests for reasonable accommodation in the work place to the Commission in the meeting held September 8, 1993. In this meeting Respondent Klebous-Zivny admitted a second request was made. (Commission's record). However, these facts were not addressed by the Commission in its Determination and Order dated June 30, 1994, (App. pp. A-5-12, *infra*.).

This issue was again reported to and placed on the record with the Supreme Court County of New York (via Article 78 proceeding - Article 78 brief at page 4 point 6; also its Appendix as Attachment B pages 12-14 point b, page 17 point a, page 22 point a, page 24 point b). However, the Court still did not address this issue in its Decision and Order dated November 17, 1994, (App. pp. A-15-19, *infra*.).

The Supreme Court (Appellate Division, 1st Department) County of New York also did not address this issue and thus, did not apply the law in its Decision and Order dated January 25, 1996, (App. p. A-21, *infra*.).

7. Bonus and Vacation Days

Title 1 of the Americans With Disabilities Act (29 CFR part 1630.4(c)). The Administrative Code of the City of New York Section 8-107.1(a).

The Commission overlooked and misapprehended the denial to Mr. Toro of, A) bonus and B) vacation days by the Respondents, when he had already earned the rights to these benefits. A) Specifically, the right to a bonus was earned when Mr. Toro met the criteria described in Respondent Depository Trust Company's Management incentive Bonus Guidelines (MIB) for 1992, (Commission's Record). Mr. Toro was denied the bonus because the Respondents refused to acknowledge Mr. Toro's right to remain employed while he was disabled. Additionally, another similarly situated disabled employee received a bonus while out on disability; the record shows as follows:

"c) Also the record shows at least one employee (see Proskauer Rose Goetz & Mendelson Position Statement dated June 1, 1993, Exhibit E, employee #2534) receiving a bonus while still on short term disability just as I was, which further proves I was treated differently and discriminated against."

(Article 78 - Appendix as Attachment B pages 14-15 point c).

B) The Commission overlooked and misapprehended the denial of payment for unused vacation days to Mr. Toro. Respondent Depository Trust Company's written policy states as follows:

"After the first calendar year of employment an employee who leaves the Depository after May 1st is entitled to the unused vacation for the current year." (Commission's record)

As such, because Mr. Toro was employed by Respondent Depository Trust Company for well over six years before going on disability; he was entitled to payment for unused vacation days.

These issues were again reported to and placed on the record with the Supreme Court County of New York (via Article 78 proceeding - Article 78 brief page 5 point 7a; and its Appendix as Attachment B page 10 point b, pages 11-12 point a, pages 14-15 point c, page 15 point e). However, the Court still did not address these issues in its Decision and Order dated November 17, 1994, (App. pp. A-15-19, *infra*.).

The Supreme Court (Appellate Division, 1st Department) County of New York also did not address these issues and thus, did not apply the law in its Decision and Order dated January 25, 1996, (App. p. A-21, *infra*.).

REASONS FOR GRANTING THE PETITION

The New York City Commission on Human Rights, the New York SUPREME COURT (IAS Court) and the New York SUPREME COURT (Appellate Division, 1st Department) of the State of New York, County of New York have not addressed the portions of the record which pertain to Federal Issues. Specifically, not addressing the facts which prove violation of Federal, State and City laws and not applying the laws and their respective remedies.

Subsequently, the New York State COURT OF APPEALS has not allowed a discretionary review of the case which would allow for the facts of the case to be heard and for identification of violation of

the various laws and application of the appropriate remedies.

This so far, departs from the accepted and usual course of judicial proceedings and results in sanctioning such a departure by the lower courts. Thus, calling for an exercise of this Court's supervisory power. Adequate relief cannot be obtained in any other form or any other court.

The numerous Federal, State and City laws violated by one corporation (Respondent Depository Trust Company) against the same disabled employee (Petitioner Charles A. Toro) constitutes a LANDMARK CASE and thus, REPRESENTS A SIGNIFICANT IMPORTANCE TO THE PUBLIC INTEREST for all similarly situated disabled employees and all employees as a whole.

As a disabled employee with AIDS (for 6 1/2 years), the Petitioner is fighting for himself, other disabled employees and those who are terminally ill. The Petitioner respectfully requests/begs the Court to hear this case in the hopes that it will be considered a LANDMARK CASE. Thus, benefiting disabled individuals who because of poor health or who simply do not survive their illness cannot defend themselves against employers (both small and large corporations) who systematically and repeatedly discriminate and, thereby, deceive disabled employees out of their rightfully earned employment benefits. This type of rampant and reckless violation of Federal, State and City laws MUST BE STOPPED.

Additionally, having the United States SUPREME COURT address the numerous Federal laws which were violated by one large employer (Respondent Depository Trust Company) and apply the respective remedies will send a message to all employers that THIS TYPE OF DISCRIMINATION/ABUSE OF DISABLED EMPLOYEES WILL NOT BE TOLERATED IN THE UNITED STATES OF AMERICA.

CONCLUSION

The petition for a writ of certiorari should be granted for the foregoing reasons.

Respectfully submitted,

CHARLES A. TORO (PRO SE)
1 Tahoe, Village 2
New Hope, PA 18938
(215) 862-9773

DETERMINATION AND ORDER AFTER INVESTIGATION

CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

In the Matter of the Complaint of CHARLES A. TORO, Complainant, - against - THE DEPOSITORY TRUST COMPANY; STUART FISHBEIN and LORI KLEBOUS-ZIVNY Respondents.	)	Complaint No. AE-93-0673 (EEOC #16F-93-0124)

DETERMINATION AND ORDER AFTER REVIEW

CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

CHARLES A. TORO, Complainant, - against - DEPOSITORY TRUST COMPANY; STUART FISHBEIN and LORI KLEBOUS-ZIVNY Respondents.	)	Complaint No. AE-93-0673

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 3

CHARLES A. TORO, Petitioner, - against - DEPOSITORY TRUST COMPANY; STUART FISHBEIN and LORI KLEBOUS-ZIVNY and NEW YORK CITY COMMISSION ON HUMAN RIGHTS Respondents.	)	Index No. 129661/94

AT A TERM OF THE APPELLATE DIVISION OF
THE SUPREME COURT HELD IN AND FOR THE
FIRST JUDICIAL DEPARTMENT IN THE
COUNTY OF NEW YORK, ENTERED ON MAY 25, 1995

Present -- Hon. Betty Weinberg Ellerin Justice Presiding
Theodore R. Kupferman
Sidney H. Asch
Milton L. Williams
Peter Tom, Justices

CHARLES A. TORO,
Petitioner-Appellant,

- against -

DEPOSITORY TRUST COMPANY et al.,
Respondents-Respondents

M-1855
Index No. 129661/94

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT
STATE OF NEW YORK, COUNTY OF NEW YORK

Rosenberger, J.P., Nardelli, Williams, Tom, Mazzarelli, JJ.

56734 In re Application of Charles A. Toro,
Petitioner-Appellant, Pro Se

- against -

Depository Trust Company, et al.,
Respondents-Respondents.

STATE OF NEW YORK
COURT OF APPEALS

DECISION April 4, 1996

1-10 Mo. No. 256 Motion for
In the Matter of Charles A. Toro Leave to Appeal
Appellant,

v.

Depository Trust Company, et al.,
Respondents

STATE OF NEW YORK
COURT OF APPEALS

PRESENT, HON. RICHARD D. SIMONS,
Senior Associate Judge, presiding

1-10 Mo. No. 256
In the Matter of Charles A. Toro
Appellant,

v.

Depository Trust Company, et al.,
Respondents.

Order Dated April 4, 1996
Motion for Leave to Appeal.

STATE OF NEW YORK
COURT OF APPEALS

DECISION June 13, 1996

2-10 Mo. No. 658
In the Matter of Charles A. Toro
Appellant,

v.

Depository Trust Company, et al.,
Respondents.

Motion for Reargument of
Motion for Leave to Appeal

STATE OF NEW YORK
COURT OF APPEALS

PRESENT, HON. RICHARD D. SIMONS,
Senior Associate Judge, presiding

2-10 Mo. No. 658
In the Matter of Charles A. Toro
Appellant,

v.

Depository Trust Company, et al.,
Respondents.

Order Dated June 13, 1996
Motion for Reargument of
Motion for Leave to Appeal

THE DEPOSITORY TRUST COMPANY
Letter dated December 16, 1992

LIST OF BENEFITS PREPARED BY RESPONDENT KLEBOUS-ZIVNY

WAIVER OF LIABILITY / RELEASE

CONTRACT FOR LONG TERM DISABILITY BENEFITS

DETERMINATION AND ORDER AFTER INVESTIGATION

CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

In the Matter of the Complaint of	)	
CHARLES A. TORO,	)	
Complainant,	)	Complaint No.
- against -	)	AE-93-0673 (EEOC #16F-93-0124)
THE DEPOSITORY TRUST COMPANY;	)	
STUART FISHBEIN and	)	
LORI KLEBOUS-ZIVNY	)	
Respondents.	)	

On March 23, 1993, complainant Charles A. Toro ("complainant") filed a verified complaint with the New York city Commission on Human rights ("Commission"), charging that The Depository Trust Company ("Depository Trust"), Stuart Fishbein and Lori Klebous-Zivny (collectively "respondents") discriminated against him by denying him equal terms and conditions of employment because of his disability of Acquired Immune Deficiency Syndrome ("AIDS"). Complainant alleges that respondents violated Section 8-107.1(a) of the Administrative Code of the City of New York ("Code"). The complaint was amended on April 15, 1993, to allege that respondents failed to accommodate complainant by refusing to preserve his position or a comparable position upon his return from disability leave, and to charge that respondents violated Title I of the Americans With Disabilities Act, 42 U.S.C. 12101.

Complainant alleges that he was denied equal terms and conditions of employment because of his disability of AIDS. Specifically, he alleges that he was denied certain long term disability benefits that similarly-situated disabled employees, who do not have AIDS, would receive. Complainant also alleges that he was denied a bonus in 1992, while similarly situated non-disabled employees with similar employment evaluations did receive bonuses. Complainant further alleges that he was denied certain pension benefits and compensation for accrued vacation time because he has AIDS. Last, Complainant asserts that respondents failed to accommodate him by refusing to preserve his then current position or make a comparable position available upon his return from disability leave.

Respondents deny that they discriminated against complainant. Specifically, respondents assert that complainant received all benefits to which he was entitled pursuant to Depository Trust's various benefit policies. While respondents acknowledge that complainant was not given a bonus for 1992, they explain that this was due to the fact that complainant's future "potential" as an employee ceased after his announcement that he would not return to work. Respondents also deny that they failed to accommodate complainant by not preserving his position or offering him a comparable position. Specifically, respondents assert that it was complainant who announced that he would not return to work because he could no longer effectively perform his duties.

After investigation, the Commission has determined that there is no probable cause to believe that respondents denied complainant equal terms and conditions of employment because of his disability. Nor is there probable cause to credit the allegation that respondents failed to accommodate complainant by refusing to preserve his position or a comparable position because of his disability.

1. **Respondents did not deny long term disability benefits to complainant**

Complainant alleges that respondents denied him certain long term disability benefits because he has AIDS. Specifically, complainant charges that respondents based his long term disability benefits on an erroneous salary base. Instead of including a projected September 1992 raise into the salary base, complainant asserts that respondents calculated his long term disability benefits on his salary in effect in July 1992 (just prior to when complainant became disabled). Complainant asserts that he was verbally assured that his long term disability benefits would be based on his salary in effect after the projected September 1992 raise became effective.

Nothing in the investigation supports complainant's allegation that respondents denied him long term disability benefits or made any decisions regarding benefits based on his disability. The evidence shows that complainant received all long term disability benefits to which he was entitled pursuant to the group long term disability policy held by respondent Depository Trust with UNUM Life Insurance Company of America. The investigation conclusively established that long term disability benefits were based on the disabled employee's salary in effect immediately prior to the date the disability began. In this case, complainant became disabled on or about July 20, 1992.

Respondents therefore correctly based complainant's benefits on his salary in effect just prior to that time.

To suggest that a potential raise in September 1992 should have been taken into account when calculating long term disability benefits is simply untenable. First, it must be emphasized that it was not up to respondents to decide which salary base would be used in order to calculate benefits. Such determination had to be made in accordance with the terms of the benefits policy to which respondents were bound. Second, there is no evidence in the record to suggest that other disabled employees received long term disability benefits based on salaries which included potential future raises.

Complainant alleged during the investigation that he was verbally assured by management that his long term disability benefits would take into account his projected September raise. While it is impossible to ascertain the veracity of complainant's assertion, it is nonetheless undisputed that complainant was, on at least one occasion, told that his benefits would be based on his salary in effect just prior to when he became disabled. When viewed as a whole, the record is devoid of any evidence suggesting that respondents deliberately mislead complainant with respect to his benefits. While the problem may, at best, have been one of communication, there is absolutely no indication of discrimination on the part of respondents. Clearly, complainant spoke to numerous employees at respondent Depository Trust concerning his benefits. Some of those employees may have been more or less educated about the specific provisions of Depository Trust's long term disability policy. Furthermore, the evidence conclusively established that complainant received all long term disability benefits to which he was entitled to.

Accordingly, complainant was not treated differently than other disabled employees who do not have AIDS.

2. **Respondents did not deny pension or vacation benefits to complainant**

The investigation failed to uncover any evidence to support the allegation that respondents denied complainant pension benefits. It is undisputed that complainant is "vested" in respondent Depository Trust's pension plan by virtue of having been employed with respondents for over five years. Pursuant to the terms of respondents' pension plan policy, a vested employee may collect pension benefits upon reaching the age of 55. No other rights are conferred upon a "vested" employee. Because complainant has not reached the age of

55, he is not, at this time, entitled to any benefits from respondents' pension plan. Accordingly, the record shows that complainant is not discriminatorily being denied any pension benefits.

The investigation also failed to uncover any evidence to support the allegation that respondents denied complainant any vacation benefits. Specifically, complainant asserts that respondents owe him compensation for six vacation days accrued prior to his hospitalization in July 1992. The record does not support complainant's assertion. Instead, the investigation revealed that complainant used all of his accrued vacation time during, or shortly after, his July 1992 hospitalization. Specifically, complainant used his vacation time immediately after he ran out of sick leave. The record also shows that when complainant eventually ran out of vacation days, respondents advanced complainant over 100 days of sick leave. By doing so, respondents assured complainant a constant and uninterrupted source of income until such time that he became eligible for short term disability benefits.

Accordingly, complainant was not denied any pension or vacation benefits.

3. **Respondents did not discriminatorily deny complainant a bonus**

Complainant charges that respondents discriminatorily denied him his 1992 bonus. While respondents acknowledge that complainant did not receive a bonus, they deny that this was due to discriminatory reasons.

The record conclusively established that sometime in December 1992, respondent Depository Trust offered bonuses to "middle management" employees such as complainant. Bonuses were to be based on the past performance and the future potential of the employee. It is undisputed that, on or about September 15, 1992, complainant received a performance evaluation which rated his overall performance as "effective" and "above average". Complainant therefore satisfied the first condition for receiving a bonus. Complainant failed, however, to satisfy the second condition concerning his "potential" as an employee. Respondents convincingly established that complainant's future "potential" as an employee ceased, in effect, after he advised respondents that he was no longer able to return to work.[1] The same would have been true for any other

[1] Complainant did so on at least three separate occasions in late September and early October 1992. See paragraph 4 below.

employee whose future potential ceased during the course of the year.[2]

Accordingly, respondents' decision to deny complainant a bonus for 1992 was not discriminatory.

4. Respondents did not fail to accommodate complainant by refusing to preserve his position or make a comparable position available upon his return from disability leave

Complainant alleges that respondents failed to accommodate him by refusing to preserve his position or make a comparable position available upon his return from disability. The investigation does not support this allegation.

At the outset, it must be noted that there was no evidence in the record to suggest that complainant ever formally requested to return to work with Depository Trust even though he may in theory have wanted to do so.[3] The evidence shows that complainant was never denied his original or a comparable position. Instead the investigation established that complainant was unable to return to work because of his disability. Accordingly, complainant's allegation that respondents failed to accommodate him is without merit and must be dismissed.

i. Complainant never formally requested to return to his original job or to a comparable position with Depository Trust

The record is absent of any evidence to support the allegation that respondents denied complainant the opportunity to return to work.[4] In order for complainant to have been denied an opportunity to return to work, the record would first have had to show that complainant made a request to return to work. At no time did complainant do so. Instead, the record shows that complainant advised respondents on several occasions that he was not able to return to

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[2] The bureau interviewed at least one other Depository Trust employee who, in 1992, became disabled with a non-AIDS related condition. This employee confirmed that she too did not receive an annual bonus because she was unable to return to work.

[3] During the investigation, complainant alleged that he had advised respondents that he was willing to return to work.

[4] The investigation revealed that, starting in July 1992 and throughout the period during which complainant received short term disability, complainant maintained an active employment status with Depository Trust, which permitted him to return to work at any time. After january 1993, complainant began receiving long term disability benefits. At that time complainant was placed on an inactive employment status, which meant that he cound no longer be guaranteed a job.

work. While complainant did so in a somewhat unconventional manner, the record is nonetheless clear.

Shortly after complainant's hospitalization in July 1992, complainant advised respondents Fishbein and Klebous-Zivny that he wanted to disclose his disability to his co-workers in order to "make it easier for anyone else so they wouldn't fear discrimination or feel stigmatized." (Complainant's position statement dated march 12, 1993.) Complainant asserts that respondents initially agreed to make a public announcement on or about September 2, 1992, concerning his disability. Fearing a lawsuit for breach of confidentiality, respondents eventually backed out on their agreement with complainant choosing not to make such a public announcement unless complainant authorized them to do so in writing. Thereafter, a controversy arose between the parties concerning the language of this authorization. The investigation unequivocally established that complainant executed three documents. In the First letter signed on or about September 17, 1992, complainant stated:

> I Charles A. Toro do hereby reserve the right to inform members of the Depository Trust Company of my illness as well as give exclusive authorization to Stu Fishbein and Lori Klebous-Zivny to inform members of the Internal Audit Department of my illness (AIDS) and that I will be out on temporary disability and may not return to work.

Apparently not satisfied with the above statement, respondents requested that complainant execute a "Limited Authorization and Release". Said authorization and release, executed by complainant on September 24, 1992 stated in pertinent part:

> I, Charles A. Toro, hereby authorize Stuart Fishbein and Lori Klebous-Zivny to inform my co-workers, to with: in the Internal Auditing Department that I have AIDS and that I do not plan to return to work at this time (subject to recision in the event of improvement).

On or about October 7, 1992, complainant wrote a third letter addressed to his co-workers in the Audit Department in which he stated:

> [a]t this time, the disease has progressed to the point where it has affected my vision. Also, recent hospitalizations for related illnesses has made me realize that I can no longer effectively perform my responsibilities at work. . . . I have enjoyed working with all of you and will miss you tremendously.

Complainant's assertion that he was coerced into executing the September 24 statement is simply not persuasive. While respondents may have demanded an unequivocal "release" from complainant before agreeing to disclose his disability, there is no evidence to suggest that complainant was forced to state that he did not ever plan to return to work. In fact, in his September 24 letter, complainant clearly reserved the right to rescind his "plans not to return" to work. Further, even assuming that respondents did pressure complainant into executing the September 24 letter, the only motivation for respondents to do so was that complainant had requested that his disability be disclosed to his co-workers. Had complainant not insisted that respondents disclose his condition to his co-workers, complainant would not have been asked to sign a letter at all. Last, there is no evidence to suggest that complainant was ever forced to sign the October 7 letter in which he again reiterated that he was unable to return to work.

Based on the foregoing statements, it was reasonable for respondents to conclude that complainant was not able to and would not return to work at the Depository Trust. Furthermore, the foregoing statements rebut complainant's allegation that he ever applied for, and was denied the opportunity to return to work with respondents.

ii. Medical evidence suggests that complainant was not able to return to work

In addition to the obvious ramifications that go with collecting disability benefits, independent medical documentation obtained during the investigation and interviews with complainant's physician confirmed that complainant was unable to return to work during the relevant time period. Specifically, complainant's physician stated to the investigator that complainant "was not, absolutely not able to return to work" and that complainant's condition would never improve.

Accordingly, while complainant may have wanted to return to work, the record indicates he was unable to do so.

iii. There is no evidence to suggest that complainant was coaxed into not returning to work

During the course of the investigation, complainant alleged that he was somehow coaxed into not returning to work with assurances that he would be getting generous disability benefits. Complainant also charged that respondent Klebous-Zivny suggested that he "should enjoy the time he had left and not return to work."

(Amended Complaint paragraph 7). Respondents denied the foregoing charges.

There is no evidence in the record to suggest that respondents somehow coerced or even encouraged complainant not to return to work for AIDS-phobic reasons. Rather, the record shows that respondents were concerned for complainant as evidenced by respondent Klebous-Zivny's numerous visits to complainant while he was in the hospital, and the advancement of sick leave to insure steady income for complainant.

Accordingly, there is no basis to conclude that respondents failed to accommodate complainant because of his disability.

Upon the foregoing, all the allegations of the complaint are ordered dismissed.

The complainant may apply for review of this order by filing a request in writing for such review within thirty (30) days after the date of the mailing of this order. The application should be addressed to the Office of the General Counsel; New York City Commission on Human Rights, 40 Rector Street, 10th Floor, New York, New York, 10006; attention: NPC Appeals Processing. Please state reasons for applying for the review.

Dated: 6/30, 1994

CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

By: s/_____
Randolph E. Wills
Managing Attorney
Law Enforcement Bureau
40 Rector Street
New York, NY 10006

To Complainant:

Mr. Charles A. Toro
1 Tahoe Village 2
New Hope, Pennsylvania 18938

To Respondents:

Allan H. Weitzman, Esq.
Proskauer Rose Goetz &
Mendelsohn
1585 Broadway
New York, New York 10036
(attorney for respondents)

DETERMINATION AND ORDER AFTER REVIEW

THE CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

CHARLES A. TORO, Complainant,	)	
- against -	)	Complaint No. AE-93-0673
DEPOSITORY TRUST COMPANY; STUART FISHBEIN and LORI KLEBOUS-ZIVNY Respondents.	)	

Complainant Charles Toro ("Complainant") requests review of the May 30, 1994 Determination and Order After Investigation ("Determination") dismissing the Complaint in this proceeding.

In considering Complainant's request, we have reviewed the following: the Complaint, the Determination, Complainant's letter of appeal dated July 20, 1994 and Respondents' letter dated September 2, 1994.

Upon review of these materials, for the reasons stated in the Determination, I hereby affirm the finding that probable cause does not exist to credit the Complainant's allegations that Respondents Depository Trust Company, Stuart Fishbein and Lori Klebous-Zivny ("Respondents") discriminated against him in violation of the Administrative Code of the City of New York..

The Complaint is hereby dismissed.

IT IS SO ORDERED.

Complainant has 30 days to appeal the determination to the New York State Supreme Court. Please take notice that a complainant who seeks judicial review of this decision and who receives an adverse state court decision, may lose his or her right to proceed subsequently in Federal Court under Title VII or the Civil Rights Act of 1964, as amended.

Dated: September , 1994

IT IS SO ORDERED.
COMMISSION ON HUMAN RIGHTS

BY s/ _____
Marta Varela
Commissioner / Chair

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 3

CHARLES A. TORO, Petitioner, - against - DEPOSITORY TRUST COMPANY; STUART FISHBEIN and LORI KLEBOUS-ZIVNY and NEW YORK CITY COMMISSION ON HUMAN RIGHTS Respondents.	)	Index No. 129661/94

WILLIAM J. DAVIS, J. :

Petitioner Charles a. Toro, Pro Se, moves for judgment, pursuant to §8-110[1] of the New York City Administrative Code, setting aside in whole or in part, the determination made by the respondent New York City Commission on Human Rights (the Commission) in Complaint Number AE93-0673, that respondent Depository Trust Company and its employees Stuart Fishbein and Lori Klebous-Zivny did not unlawfully discriminate against the petitioner Toro. Toro moves for judgment on the ground that the determination is arbitrary, capricious and in violation of law and not supported by sufficient evidence presented in the record.

Respondents Depository Trust Company cross-moves[2], pursuant to §8-125 of the New York City Administrative Code, for judgment confirming the Commission's determination of no probable cause.

This proceeding is brought under the New York City Administrative Code (see, Burlington Industries, Inc. v Human Rights Commission, 82 AD2d 415). Section 8-110 of the Code provides the following:

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[1] The petitioner Pro Se inadvertently brings the petition under Article 78, however, this mistake is not fatal to the application. This proceeding is the equivalent to an Article 78 proceeding. The issue, however, of substantial evidence must first be determined by this Court, unlike CPLR 7804 (g), which mandates reference to the appellate court (see, New York city Administrative Code, §8-123(f) [the jurisdiction of the supreme court "shall be exclusive and its judgment and order shall be final, subject to review by the appellate division of the supreme court".]).

[2] Respondent inadvertently cross-moves under CPLR 404. The mistake is also not fatal to the cross-motion.

" 'Judicial review and enforcement. Any complainant, respondent or other person aggrieved by such order of the commission may obtain judicial review thereof, and the commission may obtain an order of the court for its enforcement, in a proceeding as provided in this section. . . . [T]he court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, ... The findings of the commission as to the facts shall be conclusive if supported by sufficient evidence on the record considered as a whole . . . .' "

The standard of review of the Commission's findings is, according to the Code, "sufficient evidence" considered as a whole. "Sufficient evidence" is synonymous with substantial evidence (Burlington Industries, Inc. v Human rights Commission, supra, affirmed 58 NY2d 983; State division of Human Rights on Complaint of Green v Eastman Kodak Co., Kodak Apparatus Div., 55 AD2d 842). Substantial evidence is relevant proof as a reasonable mind might accept as adequate to support a conclusion or ultimate fact (300 Gramaton Avenue Associates v State Division of Human Rights, 45 NY2d 176, 180).

The court's function is to review the record to determine whether it contains such evidence providing a rational basis to support the findings of fact on which the Commission's determination is based (Id, at 181). Upon review of such findings the court may not "substitute its judgment for that of the [commission]. Rather, as the Court of Appeals has stated 'where there is room for choice, neither the weight which might be accorded nor the choice which might be made by a court are germane upon an analysis for the presence of substantial evidence before the [commission]' " (Id, at 180).

The task of reviewing a record for discrimination is difficult because discrimination is usually practiced in devious ways and by elusive methods (State Division of Human Rights v Kilian Mfg., Corp., 35 NY2d 201, appeal dismissed 420 US 915). Hence, the findings made by the trier of fact, who had the opportunity to evaluate the credibility of the witnesses, is to be accorded considerable deference. As stated by the court in State Division of Human Rights v Wagner (39 NY2d 865, 866):

"Unlawful discrimination in the present day is generally practiced in subtle ways (Matter of Holland v Edwards,

307 NY 38, 45 (119 NE2d 581) . . . That others would require stronger evidence to reach the ultimate factual inferences is not relevant. The inference-making function, as it is exercised at the evidentiary or fact-finding level, is exclusively that of the administrative agency (Matter of Pell v Board of Education, 34 NY2d 222. 230 [citations omitted]."

Toro filed a complaint against the respondent Depository Trust Company and two of its employees, on or about March 23, 1993, charging that they collectively discriminated against him by denying him equal terms and conditions of employment disability and pension benefits because he has Acquired Immune Deficiency Syndrome (AIDS). Toro amended his complaint to allege that these respondents: (1) failed to accommodate him by refusing to preserve his position or a comparable position upon his return from disability leave and; (2) to charge that they violated Title I of the Americans With Disabilities Act, 42 U.S.C. §12101. The respondents denied the charges contained in that complaint.

After investigation, the Commission determined that there was no probable cause to believe that respondents denied Toro equal terms and conditions of employment because of his medical disability. The commission also found no probable cause to credit the allegation that the respondents employer and employees failed to accommodate Toro by refusing to preserve his position or a comparable position because of his disability.

This proceeding ensued after the determination was affirmed on administrative appeal. The petitioner makes several contentions in support of his petition.

First, he complains that the Commission failed to address the request to amend his complaint to allege that an unsigned letter containing an acknowledgment of his AIDS diagnosis and that he did not plan on returning to work, was evidence of Depository Trust Company's intent to discriminate against him because he has AIDS and to give the impression that Toro was not returning to work on his own accord.

Second, he complains that the Commission did not address the issue of petitioner's prior request for pension materials from Depository Trust Company during his medical leave, which he claims were ignored, supporting the contention that Depository Trust Company had a hidden agenda to stall the petitioner as long as possible in order to terminate his employment by any means, lest grant him

disability benefits.

Third, he complains that the Commission did not address specific documentary evidence, i.e., letter dated December 16, 1992[3], to further support his claim of a hidden agenda.

Fourth, he complains that the Commission did not specifically address alleged discriminatory practices by Depository Trust Company in both short-term and long-term disability procedures and his payment of premiums for long-term disability insurance based on his last salary base of $62,000, which were refunded to him by Depository Trust Company.

Fifth, he complains that the commission ignored evidence to support his contention that Depository Trust Company failed to reasonably accommodate him under the Americans With Disabilities Act and failed to take testimony from his partner, Jack Serratelli to support this claim.

Lastly, he complains that the Commission failed to address inconsistent arguments by the Depository Trust Company regarding why it advanced the petitioner 100 sick days in order to continue his income.

In its determination dated June 30, 1994, the Commission found that its investigation did not support petitioner's allegation that Depository Trust Company denied him long-term disability benefits or made any decisions regarding benefits based on his disability, nor did it find the petitioner was denied pension benefits, because his entitlement to a pension would not accrue until upon his reaching the age of 55, and that no other rights are conferred upon a vested employee. In fact, the Commission found that the petitioner received all long-term disability benefits to which he was entitled pursuant to the group long-term disability policy held by Depository Trust Company with UNUM Life Insurance Company of America. Furthermore, it found that petitioner's disability payments were based on petitioner's salary in effect immediately prior to the date the disability began.

Moreover, the Commission did not find that the Depository Trust company failed to accommodate the petitioner by refusing to preserve his position and that the record supported the finding that the petitioner never formally requested to return to his original job or to a comparable position with Depository Trust company. The Commission also made reference to three executed letters signed by the petitioner granting Depository Trust Company authority to disclose

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[3] The documentation is annexed to the petition as exhibits.

his medical condition to employees with whom he worked and also his contemplation of not returning to work -- not that he was in fact resigning (see, Notice of Cross-Motion, Ex A, pp 9-10), and that the purpose of the letters was to protect Depository Trust Company from any liability with regard to petitioner's right of privacy relating to his medical diagnosis.

The Commission also found that the 100 sick day advancement was to assure that the petitioner would have constant and uninterrupted source of income until such time that he became eligible for short term disability benefits.

In short, the Commission concluded that there was no evidence to suggest that the petitioner was coaxed into not returning to work, and that he was not treated differently than other disabled employees who do not have AIDS. These findings were affirmed on administrative appeal.

The scope of judicial review is narrow and is confined to the consideration of whether the Commission's determination is supported by sufficient evidence (Burlington Industries, Inc. v Human Rights Commission, supra), and the court may not weigh the evidence or reject the Commission's findings "when the evidence is conflicting and room for choice exists" (City of New York v State Division of Human Rights, 70 NY2d 100, 106). Thus, where a rational basis for an agency finding of no discrimination is found, the judicial function is exhausted (City of New York v State Division of Human Rights, supra). The Court is of the opinion that the Commission's determination of no probable cause and dismissing the petitioner's complaint is supported by ample and sufficient evidence (Rudow v New York City Commission on Human Rights, 123 Misc2d 709, affirmed 109 AD2d 1111, appeal denied 66 NY2d 605). The Commission's determination will not be disturbed.

Accordingly, the petition is denied and respondents' cross-motion to confirm the determination of no probable cause is granted. The petition id dismissed.

ORDERED that the petition is denied, and it is further

ORDERED that the cross-motion is granted, and it is further

ORDERED and ADJUDGED that the petition is dismissed.

This shall constitute the decision and judgement of the Court.

Dated: Nov. 17, 1994

s/ _____

William J. Davis J.S.C.

AT A TERM OF THE APPELLATE DIVISION OF
THE SUPREME COURT HELD IN AND FOR THE
FIRST JUDICIAL DEPARTMENT IN THE
COUNTY OF NEW YORK, ENTERED ON MAY 25, 1995

Present -- Hon. Betty Weinberg Ellerin Justice Presiding
Theodore R. Kupferman
Sidney H. Asch
Milton L. Williams
Peter Tom, Justices

CHARLES A. TORO,)
Petitioner-Appellant,) M-1855
- against -) Index No. 129661/94
DEPOSITORY TRUST COMPANY et al.,)
Respondents-Respondents)

Petitioner-appellant pro se having moved for an enlargement of time in which to file a notice of appeal and for leave to file a notice of appeal in connection with the judgment of the Supreme Court, New York County, entered on or about November 17, 1994,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same is granted to the extent of deeming the notice of appeal dated April 4, 1995 as timely served (see communication from defendant's council dated May 3, 1995 to the Clerk of this Court) and enlarging petitioner-appellant's time in which to perfect the appeal to the October 1995 Term of this Court, with leave to seek a further enlargement, if necessary. Defendant id directed to have filed with the clerk's office of Supreme Court, a copy of the "Decision and Judgment" herein and to annex a copy of the Notice of Appeal thereto with a copy of this order within thirty (30) days after the date of entry hereof.

ENTERED:

s/_____
Catherine O'Haqou Wolfe
Clerk

Rosenberger, J.P., Nardelli, Williams, Tom, Mazzarelli, JJ.

56734 In re Application of Charles A. Toro,
Petitioner-Appellant, Pro Se

- against -

Depository Trust Company, et al.,
Respondents-Respondents. C.J. Collins

Order, Supreme Court, New York County (William Davis, J.), entered on or about November 14, 1994, which denied petitioner's application pursuant to CPLR Article 78 seeking to annul the determination of the New York City Commission on Human Rights, dated September, 1994, that petitioner was not discriminated against by respondents Depository Trust Company, Stuart Fishbein and Lori Klebous-Zivny in violation of, inter alia, Administrative Code of the City of New York §8-107(1)(a), granted respondents' cross motion to confirm the determination, and dismissed the petition, unanimously affirmed, without costs.

The IAS court properly found that the Commission's determination that respondents did not discriminate against petitioner was supported by substantial evidence (Administrative Code §8-123[e]). Accordingly, the cross motion to confirm the Commission's determination was properly granted.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 25, 1996

s/ _____
Catherine O'Haqou Wolfes
Clerk

STATE OF NEW YORK
COURT OF APPEALS

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION April 4, 1996

1-10 Mo. No. 256
In the Matter of Charles A. Toro
Appellant,

v.

Depository Trust Company, et al.,
Respondents

Motion for leave to appeal denied.
Chief Judge Kaye took no part.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the court, held at Court of
Appeals Hall in the city of Albany
on the fourth day
of April 1996

PRESENT, HON. RICHARD D. SIMONS,
Senior Associate Judge, presiding

1-10 Mo. No. 256
In the Matter of Charles A. Toro
Appellant,

v.

Depository Trust Company, et al.,
Respondents.

A motion for leave to appeal to the court of appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Chief Judge Kaye took no part.

s/ _____
Stuart M. Cohen
Deputy Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION June 13, 1996

2-10 Mo. No. 658
In the Matter of Charles A. Toro
Appellant,

v.

Depository Trust Company, et al.,
Respondents

Motion for reargument of motion for leave to appeal denied.

Chief Judge Kaye took no part.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the court, held at Court of Appeals Hall in the city of Albany on the thirteenth day of June 1996

PRESENT, HON. RICHARD D. SIMONS,
Senior Associate Judge, presiding

2-10 Mo. No. 658
In the Matter of Charles A. Toro
Appellant,

v.

Depository Trust Company, et al.,
Respondents.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Chief Judge Kaye took no part.

s/_____
Donald M. Sheraw
Clerk of the Court

THE DEPOSITORY TRUST COMPANY

55 WATER STREET
NEW YORK, NEW YORK 10041

December 16, 1992

Mr. Charles Toro
1 Tahoe Village 2
New Hope, PA 18938

Dear Mr. Toro:

As you are aware, your short term disability coverage will expire on January 23, 1993. In the event you are unable to return to work at the expiration of short term disability coverage, you are eligible to apply for Long Term Disability coverage.

Under this program, UNUM, our insurance carrier for Long-Term Disability, would pay you 60% of your DTC salary, once your disability has been approved. They will also require that you apply for Social Security disability payments, which if approved, eventually integrate with the LTD coverage.

A copy of the booklet describing the Plan and the necessary claim form are enclosed. You and your doctor should complete the form and return it to my attention as soon as possible.

While you are on LTD, DTC will place you on an inactive employment status when LTD begins, or if you claim is rejected by the insurance company. As a management employee with five or more years of service, your medical and prescription drug coverage will continue, under specific conditions. These conditions include your paying any required contribution, and the continuation of LTD monthly payments to you from the LTD carrier. Since the dental and vision plans are not continued by DTC for you wile on LTD, you will be offered an opportunity to continue them for the next 18 months by paying for them yourself. A separate letter will be sent to you in a few weeks outlining those changes and procedures.

DTC will pay for your group life insurance at two times your salary during the LTD period.

DTC cannot guarantee a job will be available if you are able to return to work. At that time, however, you may reapply to DTC for the same or comparable job. Your application will be treated the same as that of other prospective applicants.

A return envelope is provided for your use in returning the LTD form.

If you have any questions, please call me at 212/898-3164, or Elvie Dittrick at 212/898-3148.

Very truly yours

s/
Alice McCarney
Manager, Benefits Dept.

cc: Elvie Dittrick
Attachments

1. Can you withdraw Savings Plan dollars while on Short Term Disability (STD) without penalty?

No, all such withdrawals (i.e., hardship) are subject to a 10% penalty, despite the diagnosis.

2. What will the premium payments be once on LTD for medical, dental, vision, drug, life insurance, pension and savings plan?

With 5 years of service, medical, drug and life insurance benefits continue without any cost to the LTD employee. The LTD employee is no longer eligible for dental, vision, pension and savings plan benefits.

3. How is the transition between DTC and the LTD carrier? What paperwork is necessary and how soon do the benefits start being paid?

Thirty days prior to the six month limit on STD, an application will be forwarded to the employee. Once the application has been approved by the insurance company, it takes approximately two weeks for the insurer to process it and for the benefits to start.

4. Will a person on STD receive a prorated Year-end Bonus?

Yes.

5. Is a person on STD eligible to receive an MIB?

The individual is eligible; however, no bonus is guaranteed and each individual will be evaluated based on the criteria: performance and potential.

6. What are my pension benefits, am I eligible to receive them now?

At this time there are no benefits that can be paid now. Benefits are payable only when the employee would have reached age 55. The amount will not be significant.

7. Is there any way for life insurance benefits to be paid to the employee, at least on a reduced basis, while still alive?

I, Charles Toro, hereby authorize Stuart Fishbein and Lori Klebous-Zivny to inform my coworkers in the Internal Auditing Department that I have AIDS and do not plan on returning to work. Anyone who wishes to contact me can do so by calling (215) 862-9858 or writing to 1 Tahoe Village 2, New Hope, Pa. 18938. In consideration of doing the above, I hereby release Stuart Fishbein and Lori Klebous-zivny, The Depository Trust Company, its officers and employees, assigns and heirs from any liability, loss or claims of any kind whatsoever which could arise from them individually or collectively performing my above request.

_____ _____

Charles Toro Date

THE DEPOSITORY TRUST COMPANY

MEMORANDUM

DATE: September 1991

TO: All Full-time Management Employees

FROM: Benefits Department

SUBJECT: LONG TERM DISABILITY OPEN ENROLLMENT

Management employees with more than 30 days of service are covered by a company-paid Long-Term Disability (LTD) program. Under this program, you could qualify for benefits of 60% of your base salary from a combination of Social Security and insurance payments for a disability which extends beyond 180 days.

As this coverage is paid for entirely by DTC, disability benefits would be taxable when paid.

Some employees have indicated that they would prefer to pay the LTD premium themselves as they believe it may be more tax advantageous if they were to receive these benefits. Currently, monthly premiums are $.64 per $100 of monthly base salary. (For example, premium contributions for an annual base salary of $35,000 would be $18.67 per month.) Since DTC does not provide employees with legal or tax advice, we suggest that you consult with a tax advisor concerning this matter.

Between now and September 30, 1991, we are offering management employees the opportunity to elect to pay these premiums, by payroll deductions, through December 1992. In the future, this election can only be changed annually, in December. If you have any questions or wish to elect the LTD payroll deduction process, contact Alice McCarney, Benefits Manager, ext. 3164, who will have you sign the premium deduction form. Deductions would begin in October 1991.

CHARLES A TORO
8121 AUDITING DEPARTMENT
AUDITING
55 W

DTC from the desk of MAUREEN CALLAHAN
(212) 898-3149

9-20

Chas. Toro -

As you requested.

M

HUMAN RESOURCES DEPARTMENT
BENEFITS SECTION - 49 FL.

MANAGEMENT LONG TERM DISABILITY PLAN

PREMIUM CONTRIBUTION ELECTION

NAME: CHARLES A. TORO

COST CENTER NUMBER: 8121

PHONE EXTENSION: 3315

DATE: 9/20/91

I elect to pay the premium for LTD coverage. I realize I can change this election only once a year, during December.

s/ _____
EMPLOYEE SIGNATURE

Return to: Geraldine D'Ambrosio
Benefits Department
55 Water Street
49th Floor

Applications must be returned no later than September 30, 1991.

A161

THE DEPOSITORY TRUST COMPANY

MEMORANDUM

DATE: October 2, 1991

TO: Charles Toro

FROM: Alice McCarney, Manager, Benefits Administration
s/_____

SUBJECT: Long Term Disability Premium Payment

This is to confirm that you have elected to pay the full premium for your DTC Long Term Disability coverage. The amount for you should be $14.35 per payday.

Please check your paycheck for the week ending October 18th to ascertain that the amount of deduction is correct. If it is not, please contact me on extension 3164 as soon as possible.

A partial deduction of $7.18 will be taken for the week ending October 4th.

[COPY OF STATEMENT OF EARNINGS]
[Period Ending 10/06/91]

FILED
SEP 6 1996
CLERK

No. 96-205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES A. TORO,

Petitioner,

vs.

DEPOSITORY TRUST CO., STUART FISHBEIN, LORI KLEBOUS-ZIVNY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT (APPELLATE DIVISION, 1ST DEPARTMENT) OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PROSKAUER ROSE GOETZ & MENDELSOHN LLP
By: ALLAN H. WEITZMAN, ESQ.
Counsel of Record for Respondents
2255 Glades Road — Suite 340 West
Boca Raton, Florida 33431
(561) 241-7400

Of Counsel:
LARRY E. THOMPSON, ESQ., THE DEPOSITORY TRUST COMPANY
CHRISTOPHER J. COLLINS, ESQ.

16 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Appellate Division of the Supreme Court of the State of New York err in affirming the dismissal by the New York Supreme Court, County of New York, of Petitioner's petition (pursuant to New York City Administrative Code § 8-110) to set aside the factual finding of the New York City Commission on Human Rights that Petitioner had not been discriminated against on the basis of his alleged disability?

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The Depository Trust Company does not have any parent companies or any non-wholly owned subsidiaries.

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PRELIMINARY STATEMENT

Petitioner requests that the United States Supreme Court (i) review the findings of fact made by the New York City Commission on Human Rights (the "Commission") that he was not discriminated against on the basis of his disability, and (ii) reject the findings of both the New York Supreme Court, County of New York (hereinafter "New York Supreme Court") and the New York Supreme Court, Appellate Division (hereinafter "New York Appellate Division") that the Commission's factual determinations were supported by substantial evidence. Significantly, Petitioner does not allege that either the Commission or the New York courts applied an incorrect federal legal standard or otherwise misconstrued federal law. Rather, as he did before the New York courts, his Petition simply rehashes factual allegations and arguments that were rejected by the Commission.

In addition, Petitioner has not presented any of the "compelling reasons" set forth in Rule 10 of the Supreme Court that might warrant a grant of certiorari. In particular, this case does not involve a decision by a United States Court of Appeals, nor does Petitioner assert that any of the New York courts have decided any important federal question that conflicts with a decision of a Court of Appeals or a state court of last resort. Indeed, the relevant state court of last resort in this case, the New York State Court of Appeals, denied Petitioner's motion for permission to appeal the Appellate Division's adverse ruling.

At most, Petitioner asserts that the Commission made erroneous factual findings or did not consider alleged facts that he asserts are relevant to his claim of discrimination. Such assertions do not warrant a grant of certiorari; and the Petition should, therefore, be denied. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Finally, to the extent Petitioner has requested that this Court review the findings of the Commission that the Respondents did not violate the Administrative Code of the City

of New York or New York State law, a review of these findings is obviously beyond the jurisdiction of this Court.

COUNTERSTATEMENT OF THE CASE AND OPINIONS BELOW

Petitioner is a former employee of The Depository Trust Company ("DTC"), whose employment was terminated in January 1993 after it became evident that he would be unable to return to work. Petitioner subsequently filed a Complaint with the New York City Commission on Human Rights alleging that DTC, as well as Respondents Stuart Fishbein ("Fishbein") and Lori Klebous-Zivny ("Klebous-Zivny"), both DTC employees, discriminated against him because of his disability -- AIDS. Respondents denied all of the charges of discrimination. (A-5-6).

After completing its investigation, the Commission's Law Enforcement Bureau rendered a detailed Opinion, which addressed and rejected all of Petitioner's allegations of discrimination and found no probable cause that discrimination had occurred. (A-5-12). Thereafter, the Determination was affirmed by the Commission on Petitioner's appeal. (A-13).

Petitioner then filed a Petition in Supreme Court, New York County, pursuant to New York City Administrative Code § 8-110, seeking to overturn the Commission's Determination. (A-15). Respondents cross-moved for a judgment confirming the Commission's Determination. (*Id.*) In a Memorandum Decision dated November 17, 1994, the New York Supreme Court, after reviewing each of the issues raised by Petitioner, denied the petition and granted Respondents' cross-motion to confirm the Commission's Determination. (A-15-19). The New York Supreme Court, Appellate Division, subsequently affirmed the New York Supreme Court's dismissal of the petition. (A-21). The New York State Court of Appeals denied Petitioner's motion for leave to appeal this affirmance and subsequently denied Petitioner's motion for reconsideration of the denial of this motion. (A-22-23; A-24-25).

ARGUMENT

REASONS WHY REVIEW IS NOT WARRANTED

Petitioner raises seven questions for review. As set forth below, each of Petitioner's questions are based on factual predicates that are directly contrary to the factual findings of the Commission -- findings that both the New York Supreme Court and the New York Appellate Division found to be supported by substantial evidence. Thus, with respect to each of these issues, Petitioner is asking this Court to assume the role of finder of fact and re-evaluate the evidence presented before the Commission. Because, as the New York courts found, the Commission's factual findings were supported by substantial evidence, this Court should not now re-examine those findings of fact. *See Johnston*, 268 U.S. at 227. Accordingly, the Petition for Writ of Certiorari should be denied.

1. a. Respondents' Request for Necessary Medical Documentation Was Not a Violation of the ADA.

Petitioner asserts that the Supreme Court should consider whether Respondents violated the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA") by requesting (in a December 16, 1992 letter) that he return standard long-term disability ("LTD") claim forms that contained "confidential" information regarding his medical condition. This argument was properly rejected by both the New York Supreme Court and New York Appellate Division because these requests for medical information were made pursuant to standardized LTD claim forms that reasonably required disability information, as a condition of receiving LTD benefits. (A-18; A-21). Indeed, it is simply illogical and unreasonable for Petitioner to expect, no less argue, that he should have been able to receive disability payments without revealing his disability. It is plainly not discriminatory -- or improper -- to verify disability status by medical documentation prior to payment of disability benefits.

Finally, there is no evidence in the record that the disability information provided by Petitioner was used in a discriminatory manner. Indeed, the Commission found (*See* A-6), and the New York courts affirmed (*See* A-18-21), that the Petitioner was not subjected to discrimination by Respondents, and this Court should not now reconsider that factual finding.

b. Respondents' Concern About Petitioner's Medical Condition Was Not a Violation of the ADA.

Petitioner next asserts that the Supreme Court should consider whether Respondents violated the ADA by visiting him in the hospital and inquiring about his diagnosis. Nevertheless, contrary to Petitioner's assertion, the Commission found that "the record shows that respondents were concerned for complainant as evidenced by respondent Klebous-Zivny's numerous visits to complainant while he was in the hospital." (A-12).

Accordingly, there is no basis for this Court to review this factual finding by the Commission, or the New York courts' conclusion that it was supported by substantial evidence.

2. Respondents' Request For a Release as a Condition For Granting Petitioner's Request to Inform His Co-Workers of His Disability Was Not Discriminatory.

The Commission specifically found that "[w]hile respondents may have demanded an unequivocal 'release' from complainant before agreeing to disclose his disability, there is no evidence to suggest that [Petitioner] was forced to state that he did not ever plan to return to work." (A-11). In fact, the Commission found that Petitioner voluntarily signed both the September 24, 1992 release, which states that "I do not plan to return to work at this time," and his October 7, 1992 letter, which states that "I can no longer effectively perform my responsibilities at work." (A-9-10).

Thus, the Commission made the specific factual finding, which the New York courts found was supported by

substantial evidence, that the request that Petitioner execute the waiver was not discriminatory. (A-11; A-18-19; A-21). This Court should not now re-examine this factual finding.

In addition, the conduct about which Petitioner now complains would not have violated the Older Workers Benefit Protection Act (the "OWBPA"), 29 U.S.C. § 626(f), which only applies to waivers of claims of age discrimination under the federal Age Discrimination in Employment Act. The OWBPA is inapplicable to Petitioner's claims of disability discrimination.

3. Respondents Did Not Violate ERISA By Purportedly Refusing to Respond to Requests for Pension Material.

Petitioner never raised Respondents' alleged failure to provide him with pension material before the Commission; and, therefore, it is not addressed in the Commission's Determination. (*See* A-7-8). Consequently, this allegation could not be considered by the New York courts. *See* N.Y.C. Admin. Code § 8-123(c). Nor did Petitioner assert before the Commission any purported violations of his rights under the federal Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA").[1]

In any event, Petitioner only asserts that the Commission "overlooked" the alleged fact that Petitioner was denied requested pension information. As with the other issues raised in the Petition, he does not point to any determination of federal law made by the Commission or the New York courts that would warrant the grant of certiorari on this issue.

---

[1] Although Petitioner does not now raise the issue, the Commission also found that "Respondents did not deny pension ... benefits to [Petitioner]." (A-7-8).

4. Petitioner's Job Termination Was Not Discriminatory.

Petitioner's claim that DTC discriminatorily terminated his employment was fully addressed -- and rejected -- by the Commission. Specifically, the Commission made an in-depth and well-reasoned finding that DTC did *not* discriminate against Petitioner by not preserving his position. (A-9-12). The Commission based its determination on the following facts:

(i) "There was no evidence in the record to suggest that [Petitioner] ever formally requested to return to work with [DTC]";

(ii) "[t]he evidence shows that [Petitioner] was never denied his original or a comparable position";

(iii) "the investigation established that [Petitioner] was unable to return to work because of his disability" based on

- a September 17, 1992 letter from Petitioner stating that he "may not return to work";
- a September 24, 1992 letter from Petitioner stating that "I do not plan to return to work at this time";
- an October 7, 1992 letter from Petitioner stating that "I can no longer effectively perform my responsibilities at work . . . I have enjoyed working with all of you and will miss you tremendously"; and
- undisputed medical evidence from Petitioner's doctor demonstrating that he was unable to return to work and would never again be able to resume his job duties.

(*Id*). Thus, the Commission was justified in its conclusion that the foregoing evidence was sufficient to "rebut [Petitioner's]

allegation that he ever applied for, and was denied, the opportunity to return to work with [DTC]." (A-11). Accordingly, the New York courts properly found that this factual finding was supported by substantial evidence, and it should not now be re-examined by this Court.

5. Respondents' Denial of "full" Long-Term Disability Benefits to Petitioner Was Proper.

The Commission found that Petitioner was eligible for, and had been receiving, LTD benefits through DTC's LTD insurance carrier. (A-6). Petitioner alleges, however, that DTC wrongfully based his LTD benefits on his base salary at the time he became disabled, rather than on his increased salary, which was approved in September 1992 after he became disabled. Using the former base yielded a lower LTD benefit. The Commission, however, specifically -- and in great detail -- rejected this argument, concluding that "[n]othing in the investigation supports complainant's allegation that respondents denied him long-term disability benefits or made any decisions regarding benefits based on his disability." (A-6).

Further, the New York Supreme Court carefully reviewed the evidence presented to the Commission regarding Petitioner's LTD benefit entitlement and found that the Commission's determination that his LTD benefits had been properly calculated was based on substantial evidence and was in no way discriminatory. (A-18-19). This finding was properly affirmed by the New York Appellate Division. (A-21).

6. Respondents Did Not Violate the ADA by Not Providing Reasonable Accommodations.

Notwithstanding Petitioner's assertion that the Commission "overlooked" and "misapprehended" two requests for reasonable accommodations, the Commission specifically found, based on its investigation, that Petitioner's "allegation that respondents failed to accommodate him is without merit and must be dismissed." (A-9). The New York courts concluded

that this finding was supported by substantial evidence. (*See* A-18-19; A-21).

Because Petitioner only alleges that the Commission erred in makings its factual determination that he had not been denied a reasonable accommodation, there are no grounds that warrant the grant of certiorari on this issue.

7. Respondents Did Not Violate the ADA by Denying Petitioner Bonus and Vacation Pay.

a. The Alleged Denial of a Bonus

The Commission found that Petitioner was not discriminatorily denied a bonus. (A-8-9). Specifically, after investigation, the Commission found that Petitioner failed to satisfy a necessary condition for receiving a bonus -- that he demonstrate future potential. (*Id.*). The Commission explained that "[r]espondents convincingly established that complainant's future 'potential' as an employee ceased, in effect, after he advised respondents that he was no longer able to return to work. The same would have been true for any other employee whose future potential ceased during the course of the year." (*Id.*) (footnote omitted).

Accordingly, Petitioner's objection to the Commission's findings regarding a bonus must fail because the Commission's rejection of this assertion had a rational basis. Again, this factual finding does not warrant the grant of certiorari in this case.

b. The Alleged Denial of Vacation Pay

Petitioner asserted before the Commission that DTC owed him compensation for six vacation days accrued prior to his hospitalization in July 1992. The Commission rejected this claim, finding that Petitioner used all of his vacation days and that DTC had in fact *advanced* Petitioner over 100 days of sick leave, which assured him a constant and uninterrupted source of income until he became eligible for LTD. (A-8). In particular, the Commission found that "the investigation revealed that complainant used all of his accrued vacation time

during, or shortly after, his July 1992 hospitalization. Specifically, complainant used his vacation time immediately after he ran out of sick leave." (A-8). When the six vacation days at issue are viewed in the context of the 100 day advance, no finding of discriminatory treatment could be justified; and on this basis, the New York Supreme Court found that the Commission's determination on this issue was supported by substantial evidence. (A-19).

Because the evidence regarding Petitioner's vacation pay entitlement was properly weighed by the Commission, and (as the New York courts found) its finding that DTC did not discriminatorily deny him these benefits was supported by substantial evidence, there is no basis for granting certiorari on this issue.

CONCLUSION

Based on the foregoing, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

PROSKAUER ROSE GOETZ &
MENDELSOHN LLP

By: ALLAN H. WEITZMAN, ESQ.
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